NO. 05-0420

IN RE CLAYTON HOMES, INC., ET. AL. LITIGATION

BEFORE THE MULTIDISTRICT LITIGATION PANEL
IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

MOTION FOR STAY OF PROCEEDINGS

TO: THE MDL PANEL

Subject to and without waiving any previously filed special appearances, pleas to the jurisdiction, special exceptions, motions to transfer venue, or other pleas, CLAYTON HOMES, INC., CMH HOMES, INC., VANDERBILT MORTGAGE AND FINANCE, INC., BENJAMIN JOSEPH FRAZIER, BRUCE ROBIN MOORE, JR., JOHN P. BURKE, III, JOHN WELLS and KEVIN T. CLAYTON (appearing expressly subject to and without waiver of his previously filed special appearance motions, and for the limited purpose of addressing pretrial matters, including discovery, relating to such motions in accordance with Rule 120a, TEX. R. CIV. P.) (collectively "Movants") file this Motion for Stay of Proceedings in connection with their pending Motion for Coordinated Pretrial Proceedings and Assignment of Single Statewide Pretrial Judge ("Motion for Coordinated Pretrial Proceedings"), and pursuant to TEX. R. JUD. ADMIN. 11 and 13, move this Honorable Panel to grant emergency relief consisting of a stay of all pending proceedings in accordance with Rule 13.4(b), as follows:

I.
BACKGROUND

1. On May 26, 2005, Movants - being Defendants in the underlying series of approximately 50 related cases, presently pending in four counties of South Texas - filed their Motion for Coordinated Pretrial Proceedings herein. (Since the filing of that motion, Movants JOHN WELLS and JOHN P. BURKE, III have appeared and answered in a number of the related actions, and so join herein.) A complete listing of these court actions was attached as Exhibit "A" to the Motion for Coordinated Pretrial Proceedings and is reincorporated herein by reference for all purposes.

2. On May 31, 2005, Plaintiffs and Defendants embarked upon a four-day mediation of the 50 pending Clayton Homes cases. (Plaintiffs commenced the mediation with a comprehensive demand in the hundreds of millions of dollars, and ended with a demand still in the tens of millions.) The cases did not settle at the mediation session; however, it was agreed that the positions of Plaintiffs, Defendants, and Defendants' insurance carriers were such that a continuation of negotiations for an additional period of approximately thirty (30) days was justified. The parties reached a verbal agreement at that time that all pretrial matters in all cases would be stayed during this extended settlement negotiation period, so that the parties could continue to work toward a comprehensive resolution of the Clayton Homes litigation.

3. Meanwhile, Plaintiffs' (Respondents') deadline for filing a response to the Motion for Coordinated Pretrial Proceedings was June 15, 2005, pursuant to TEX. R. JUD.

ADMIN. 13.3(d). Accordingly, on June 8, 2005, Respondents, through their appellate counsel, requested an extension of time until and including July 28, 2005, in which to file their response. *As support for that Motion for Extension of Time, Respondents and their counsel expressly referred to the agreement of the parties referenced hereinabove* (Motion for Extension of Time, at 4 - 5).

4. Although Respondents characterized their motion as an "agreed" motion, in fact Respondents did *not* obtain the consent of Movants' counsel before filing their motion on that date. Since the parties were then in the process of reducing their verbal post-mediation agreement to a written Rule 11 Agreement, however, Movants' counsel did not at that time oppose the filing of the motion. Subsequently, on June 13, 2005, the parties did in fact enter into a Rule 11 Agreement confirming the agreements and understandings that had been reached at the conclusion of the mediation on June 3, 2005; a true and correct copy of that Rule 11 Agreement is attached hereto as **Exhibit "A"** and expressly incorporated herein by reference for all purposes. (An earlier Rule 11 Agreement of May 3, 2005, a true and correct copy of which is attached hereto as **Exhibit "B"** and expressly incorporated herein by reference for all purposes, stayed discovery from that date through the mediation.) Among these agreements and understandings was that Respondents should be allowed until July 28, 2005, in which to file their response to the Motion for Coordinated Pretrial Proceedings - once again, the very same verbal agreement that was referenced in Respondents' Motion for Extension of Time. This was far from the only agreement and understanding which was confirmed under that Rule 11 Agreement, however.

5. Of crucial importance is the following, as contained in the June 13th Rule 11 Agreement:

> The parties agree that the August 1, 2005, trial setting for the Carlos Garcia and Emeteria Garcia case will be passed, but only if the Court preferentially sets this case for trial during the month of September 2005. We agree that if the cases do not settle, the first case to go to trial will be the Carlos and Emeteria Garcia case. All other cases set for trial before then or on the same date will be passed by the agreement of the parties, in accordance with paragraph 10 of the parties' Rule 11 Agreement of January 19, 2005.

In turn, paragraph 10 of the January 19, 2005, Rule 11 Agreement provides in pertinent part that

> the parties agree that the Clayton Homes cases, as filed in any of the counties in which such cases are pending, will be scheduled for trial such in that no event will either Plaintiffs or Defendants be required to go to trial less than ninety (90) days after the conclusion or resolution of the preceding trial. In the event that this results in a conflict in the setting of any other Clayton Homes case, the parties agree that one of the cases will be continued by agreement of the parties.

A true and correct copy of the January 19th agreement is attached hereto as **Exhibit "C"** and expressly incorporated herein by reference for all purposes. The trial court did in fact assign a preferential setting of the Garcia case for September 12, 2005 (see **Exhibit "D"** attached hereto and expressly incorporated herein by reference for all purposes). Thus, the parties were required to agree to a resetting of all cases set prior to September 12, 2005, such cases to be assigned a trial date at least 90 days subsequent to the conclusion of the Garcia case.

6. On July 7, 2005, the attorneys for Respondents and Movants appeared at a

court-ordered judicial conference before Judge Alex Gabert in the pending case of Vicente Saenz, et. al. v. Clayton Homes, Inc., et. al., Cause No. DC-04-137, in the 229th Judicial District Court of Duval County, Texas. Inasmuch as this case had previously been set for trial on August 1, 2005, and was therefore among the cases which the parties had agreed to pass pursuant to the June 13th Rule 11 Agreement, Movants requested a continuance of the trial setting and of the judicial conference itself - which Movants' counsel expected, based upon the express written stipulation of Respondents' counsel, would be unopposed. *Instead Respondents' counsel, in open court and on the record, announced that, not withstanding the Rule 11 Agreement, he opposed the motion for continuance, and he requested that the case proceed to trial on August 1, 2005.* In an apparent attempt to explain this bald repudiation of a written agreement to which he had affixed his signature, counsel for Respondents offered the Duval County trial court the following lucid and enlightening soliloquy:

> ...Your Honor, on the two Rule 11 Agreements that Mr. Guerra cited, the most recent Rule 11 Agreement [referring to the June 13th agreement], all that did, it did nothing more, nothing more than to reaffirm our prior agreement of January of this year [referring to the January 19th agreement], that, uh, that we will not begin a new case until ninety days after the conclusion or resolution of one. We have not concluded would be one, we have not resolved one, uh, we did not, uh, there's nothing in there that, that we agree to continue, uh, the case, uh...

Exhibit "E" (Statement of Facts, July 7, 2005, Judicial Conference Hearing), at 24.[1]

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[1] The attached transcript copy is the court reporter's uncertified draft, prepared on the evening of the hearing on an expedited basis; this motion will be supplemented with the official certified copy immediately upon counsel's receipt of same.

7. Despite Respondents' attempted repudiation of the parties' agreements, Movants announced at the hearing that they were prepared to proceed first with the special appearance motion of Defendant KEVIN T. CLAYTON. Respondents' counsel objected to proceeding with that motion, stating on the record and in open court that "they [Movants] have to request a hearing on the special appearance *and they have never requested a hearing.* They filed this in every single case *and have never requested a hearing*" (**Exhibit "E"**, at 4) (emphasis added). Attached hereto as **Exhibits "F"** and **"G"**, respectively, are true and correct copies of Movants' April 27, 2005, letter to the Duval County court manager requesting a hearing on Defendant KEVIN T. CLAYTON's Special Appearance, and Respondent's April 27, 2005, reply *objecting* to a hearing on grounds that such hearing had been stayed.

8. The trial court expressly declined to consider both the special appearance motion and the motion for continuance, instead only receiving by submission the proposed pretrial documents it had requested from the parties. (This includes the parties' respective lists of trial fact witnesses pursuant to the court's order for judicial conference, which witness lists are further discussed below.) Immediately following the hearing, Movants consulted with the court manager in order to obtain available dates for the hearing of these matters. Movants were informed by the court manager that the presiding judge would be on vacation during the ensuing two weeks (i.e., the weeks of July 11th and July 18th). As to the week of July 25th, the last week prior to the August 1st setting, the court manager stated that the court would not be in session to hear any motions in this case during that week. (The court

manager subsequently stated, in response to a request for the assignment of a visiting judge to hear such motions, that the county could not afford a visiting judge.) **Exhibit "H"** (Affidavit of Jerry Muniz).

9. The next day, July 8, 2005, Respondents filed their "Plaintiffs' Designation of Expert Witnesses" in the Saenz case - 24 days before trial. *The deadline for Plaintiffs' designation of expert witnesses and submission of expert reports had been June 1, 2005, more than five weeks earlier.*

II.
ARGUMENT AND AUTHORITIES

10. TEX. R. JUD. ADMIN. 13.4(b) provides as follows: "The trial court or the MDL panel may stay all or part of any trial court proceedings until a ruling by the MDL panel." It is difficult to conceive of a circumstance more appropriate to the invocation of this rule than the instant Clayton Homes litigation - *and, in particular, the pending Saenz case in Duval County.* Further, and in view of the foregoing, this Honorable Panel can and should rescind its earlier order granting an extension of time to Respondents until July 28, 2005, to file their response to the Motion for Coordinated Pretrial Proceedings, and proceed to grant said motion.

11. A review of the conduct of Respondents and their trial counsel in this matter confirms their obvious bad faith, of a kind and degree approaching outright chicanery. By express written agreement of the parties (in particular, the May 3rd and June 13th Rule 11 Agreements), *all* discovery in the Clayton Homes litigation was stayed for a period of more

than two months - from May 3rd until July 8th - during the time leading up to the comprehensive mediation, and the post-mediation settlement period. As Respondents' counsel are of course well aware, the nature of the Clayton Homes litigation is such that they need only depose a limited number of Defendants and corporate representatives of Defendants, while Movants' counsel must depose hundreds of Plaintiffs and manufactured home purchasers involved in the subject transactions. Thus, the parties expressly agreed that the Garcia case - which has now been almost fully discovered on both sides - would be the first to go to trial, while any other cases which have been set prior to or simultaneously with Garcia would be passed by agreement (see **Exhibit "A"**, *supra*). *But for that agreement, Movants obviously would not have foregone more than two months of discovery in the Saenz case, leading up to a mere three weeks before trial, in a case in which the Plaintiffs are seeking a judgment in the millions of dollars arising out of an alleged cloud on title of one acre of land.* Because Movants' counsel assumed that Respondents' counsel were as good as their word (their ostensibly binding, written word), Movants now face the possibility - barring the emergency relief which is respectfully requested of this Panel - of proceeding to the first Clayton Homes trial *not* on the Garcia case on September 12, 2005, as to which little discovery remains to be accomplished, *but instead on the largely undiscovered Saenz case six weeks earlier.*

12. It is of course axiomatic that a party "should not be able to take advantage of the [Rule 11] agreement and then denounce it". ***Dehnert v. Dehnert***, 705 S.W.2d 849, 851 (Tex. App. - Beaumont 1986, no writ) (citing ***Carle v. Carle***, 149 Tex. 469, 234 S.W.2d 1002

(Tex. 1950)). The fact that Respondents' trial counsel, in requesting their "agreed" extension of time from this Honorable Panel, have deceptively relied on the very same agreement which they later repudiated on July 7th not only justifies the Panel's striking of Respodents' newly filed Response to Motion for Coordinated Pretrial Proceedings, [2] *but demonstrates emphatically the necessity of the assignment of a pretrial judge to the Clayton Homes litigation, as well as an emergency order staying all proceedings in the cases.*

13. Indeed, this is especially so given Movants' unsuccessful attempts to persuade the trial court on *three* occasions - by written request dated April 27, 2005; by oral request at the July 7th hearing; and by consultation with the court manager immediately following that hearing - to hear and consider the special appearance and other motions of Defendant/Movant KEVIN T. CLAYTON. Again, as pointed out in the affidavit of Ms. Muniz (**Exhibit "H"**), the trial judge simply will not hear the motions the week after he returns from his vacation, and Duval County itself is "too poor" to afford a visiting judge to hear the case before the August 1st trial setting which Respondents' counsel had agreed in writing to pass, and which agreement they now choose to ignore. Twenty-three (23) of the fifty (50) Clayton Homes cases are pending in Duval County. There can be no clearer and more cogent argument than this in support of the assignment of a single pretrial judge to consider this motion, as well as the other pretrial and discovery matters discussed in the Motion for Coordinated Pretrial Proceedings.

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[2] Movants' counsel were delivered a copy of this response at approximately 5:30 p.m. yesterday, July 12, 2005. Movants are presently preparing a reply in the event the response is not stricken; this reply will be filed forthwith.

14. As noted, Respondents and their counsel have attempted - more than five weeks after the expiration of their deadline, and without justification or excuse therefor - to designate expert witnesses in the Saenz case, a move which if successful would greatly increase the burden on Defendants of having to prepare for an August 1st trial which Respondents had agreed to pass. Even this burden pales, however, in comparison to that of having to depose Plaintiffs' trial fact witnesses. The Duval County trial court's May 31, 2005 order for judicial conference in the Saenz case (see **Exhibit "I"** attached hereto and expressly incorporated herein by reference for all purposes) was clear and specific as to what the court expected from the parties by way of a trial fact witness list:

> (8) the exchange of a list of direct fact witnesses who will be called to testify at trial, not of witnesses with knowledge of the facts, but the actual trial witnesses that will be called by counsel, stating their address and telephone number, **and a short-hand rendition of the testimony expected of such witness;**...

(emphasis in the original, and in precisely the form indicated).

15. The court wanted and expected a manageable list of those individuals who in all likelihood would be called to testify, as well as a short statement of what they would discuss; *the court specifically did not want simply a regurgitation of the earlier designation of persons with knowledge of relevant facts.* A meaningful trial witness list was especially important in this case, since Plaintiffs' earlier identification, under Rule 194, of persons having knowledge of relevant facts consisted of *an 88-page list of approximately 730 people*, most of whose connections to the case (if they were not Plaintiffs among the related cases)

were described only in seven words: "Knowledge of Clayton Homes' conduct and practices". Due to the length of this document it is attached not as an exhibit hereto but rather as **Appendix I** of the separate bound volume accompanying this submission.

16. At the July 7th hearing Respondents, in response to the express written order of the trial court, filed their "Plaintiffs' Trial Witness List". A true and correct copy of that 87-page instrument is attached as **Appendix II** of the said appendix volume. *As this Honorable Panel will note, that list is an almost verbatim copy of 713 names from Respondents' earlier identification of persons having knowledge of relevant facts, and contains no more specific testimonial description of Respondents' own fact witnesses than "knowledge of Clayton Homes' conduct and practices".*

17. The filing and submission of "Plaintiffs' Trial Witness List" in the Saenz case denotes more than just a flagrant disregard for the Texas Rules of Civil Procedure and the lawful orders of a state district court; it is an expression of utter contempt for Defendants, their counsel, and the judicial process. Whether the perverse attitude that spawns such conduct on the part of Respondents' counsel derives from a sense of the venue in which they find themselves, or from some other source, is largely irrelevant; the conduct itself must be sanctioned and stopped. *At the very least* the Saenz case and the related Clayton Homes cases must be discovered, and their substantive pretrial issues relating to jurisdiction and venue resolved, in the controlled environment of a single pretrial judge who can bring order and discipline to Respondents' procedural frolics. *This is particularly so in that the Duval County trial court will entertain no motions on this or any other issue before the August 1st*

Saenz trial setting.

18. In view of the foregoing, Movants respectfully submit that an order for stay of proceedings pursuant to TEX. R. JUD. ADMIN. 13.4(b) is necessary and appropriate in this case.

WHEREFORE, PREMISES CONSIDERED, Movants respectfully pray that this Motion for Stay of Proceedings be granted as aforesaid; that Movants' underlying Motion for Coordinated Pretrial Proceedings likewise be granted; and for such other and further relief, at law or in equity, to which Movants might show themselves justly entitled.

Respectfully submitted,

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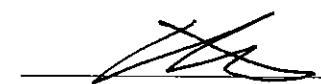

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing instrument has been served in accordance with the Texas Rules of Appellate Procedure on this the 13th day of July, 2005, to counsel of record as follows:

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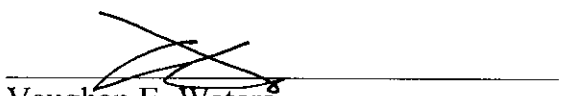

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